Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Emergency Temporary	)	
Relief Enjoyning AT&T Corp. from	)	CC Docket No. ~~96-262~~ 96-262
Discontinuing Service Pending	)	
Final Decision	)	

REPLY COMMENTS OF

RURAL INDEPENDENT COMPETITIVE ALLIANCE
CTC TELCOM
CONSOLIDATED COMMUNICATIONS NETWORKS, INC.
FOREST CITY TELECOM, INC.
HEART OF IOWA COMMUNICATIONS, INC
MARK TWAIN COMMUNICATIONS COMPANY
MID-RIVERS TELEPHONE COOPERATIVE
XIT TELECOMMUNICATIONS AND TECHNOLOGY, INC.

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June 29, 2000

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SUMMARY

While awaiting the Commission's decision on its request to be declared free to pick and choose the customers to which it will provide long distance service, AT&T initiated "self-help" to deny its service to existing customers because they chose rural CLECs as their local service providers. AT&T instructed certain rural CLECs to cease sending it originating traffic and to cease presubscribing customers to AT&T. Other CLECs were told in addition not to accept terminating traffic from AT&T. In order to preserve competitive alternatives for rural subscribers pending completion of this proceeding, and to halt AT&T's multiple violation of the Communications Act, Petitioners filed their Request for Emergency Relief with the Commission.

AT&T responded to Petitioners' request by mischaracterizing it as an effort to have the Commission dictate to a nondominant carrier the choices as to where it will do business, claimed innocense of rule violations, and attempted to justify its illegal actions by alleging that Petitioners' access rates are unreasonable. In these Reply Comments, Petitioners show that AT&T's defenses are all without foundation in fact or law.

Despite abundant rhetoric about the freedom of choice of nondominant carriers and the relationship of Section 214 to the current environment, the basic facts are not disputed: AT&T was providing service to customers of the rural CLECs; it has directed the rural CLECs to block such traffic in the future; AT&T has not applied for Section 214 authority. AT&T is therefore in violation of the law.

AT&T claims that a tariff provision (which states simply that customers may be unable to place calls where access arrangements are unavailable) gives adequate notice to customers that AT&T can refuse service to them wherever AT&T does not like the access rates of the

customer's LEC. In the real world no customer would understand that "unavailable" means AT&T doesn't want to pay a CLEC's rates. Their tariff therefore violates Section 61.2 of the Commission's Rules, as well as Section 201(b) of the Act. If the tariff is taken literally however, then AT&T's discontinuance is in violation of the very tariff provision it proffers as enabling its action: because the access arrangements are, without question, available AT&T had been using them.

AT&T's discontinuance of service to rural CLEC customers violates the public interest because it effectively deprives customers of the significant increases in service quality and access to broadband services which are unavailable from the incumbents. No CLEC (or LEC for that matter) can stay long in business if the 40% of the market served by AT&T cannot call the CLEC's customers. The AT&T position has severe anti-competitive implications because elimination of the rural CLECs will substantially improve the market position of the cable companies controlled by AT&T as they enter the local service business.

Discontinuance of service to rural CLEC customers will cause irreparable harm to those customers and the CLECs, while grant of the Emergency Request will have at most a negligible effect on AT&T. It is imperative that the Commission act quickly on this request as the longer AT&T's disconnection of service remains uncorrected, the higher the likelihood that AT&T will be the only competitor in these areas.

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To: The Commission

REPLY COMMENTS

The Rural Independent Competitive Alliance ("RICA") and its members, CTC Telecom, Consolidated Communications Networks, Inc., Forest City Telecom, Inc., Heart of Iowa Communications, Inc., Mark Twain Communications Company, Mid-Rivers Telephone Cooperative, and XIT Telecommunications and Technology, Inc. (collectively RICA or "Petitioners"), by their attorneys, file their Reply Comments in response to the comments of other parties filed June 14, 2000.[1]

I. INTRODUCTION

Petitioners were compelled to file their Request for Emergency Relief by AT&T's "self-help" action to discontinue interstate long distance service to the customers of several rural

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[1] *See Public Notice*, DA 00-1067, May 15, 2000. The Common Carrier Bureau stated that parties should not repeat arguments they made in responding to the *Access Charge Reform FNPRM*. Petitioners will make every effort to comply with this admonition; however, to the extent commenting parties failed to comply, or raised issues going to the ultimate issues in the Further Notice, Petitioners are compelled to respond to ensure that they are not taken to have conceded an important point.

Competitive Local Exchange Carriers ("CLECs").[2] AT&T initiated this action during the pendency of the rule-making proceeding instituted *at AT&T's request* to determine the obligations of interexchange carriers to provide such service.[3] AT&T's actions violate Sections 201, 202, 203, 214 and 251 of the Communications Act. Grant of Petitioners' request will serve the public interest by protecting access to the national telephone network and to modern and advanced services for rural consumers and businesses, by preventing harm to competition, and by protecting the integrity of the Commission's process.

AT&T responded to the Emergency Request by creating a strawman and then knocking it down. Contrary to what AT&T and others would have the Commission believe, Petitioners do not seek, by this Emergency Request, to compel AT&T (or any other carrier) to extend service to any community it was not holding out to serve prior to its illegal discontinuance. Whatever implications the Rulemaking may have for such a requirement, the issue is not presented by the Emergency Request, which seeks only to preserve the *status quo* pending a final determination of the issues that AT&T asked the Commission to resolve. If AT&T's disconnection without Section 214 certification is allowed to stand, much of the Rulemaking will be predetermined.

Substantial public interest benefits will result from grant of Petitioner's Request. The rural CLECs' extraordinary level of success in capturing customers from the incumbent local exchange carriers ("ILECs") is directly attributable to their response to long pent-up demand for modern,

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[2] AT&T's argument that Petitioners have no standing to raise issues involving harm to their subscribers is addressed at II(D), *infra*.

[3] In the *Matter of Access Charge Reform, Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Red 14221, 14338-349 (1999). Petitioners agree with the comments of Sprint and USTA that the Commission should resolve the underlying rulemaking promptly, however, the need for quick action on the Emergency Request is critical.

reliable and advanced telecommunications services. For many years the large ILECS serving these rural communities have virtually ignored them, avoiding investment where possible and eliminating any local presence by concentrating personnel in distant cities. Meanwhile, the neighboring areas served by rural ILEC's enjoyed state-of-the-art service with high quality and reliability, combined with a strong local presence.

The 1996 amendments to the Communications Act made it possible for the rural ILEC's to respond to the long standing requests of their neighbors to bring them modern telecommunications services. The rural ILEC's responded by qualifying as CLEC's for these areas, constructing new facilities and providing high quality basic telephone service with a full range of vertical features, video programing, and Internet access. Most offer DSL or cable modem service to provide broadband access. For the most part these services remain unavailable from the incumbent, and will be lost to the consumers if the Commission fails to act on the Emergency Request. The availability of modern telecommunications services results in substantial economic benefits to rural communities, which continue to suffer and decline as a result of adverse conditions in agricultural markets.

The complaints of AT&T and others that Petitioners' rates are higher than the incumbent fail to recognize that Petitioners' costs are higher precisely because they have made the investments to meet public demand for improved service. Comparison of their rates with the incumbents rates to provide service over obsolete, ill-maintained and mostly depreciated plant is not an apples-to-apples comparison. It is especially important to note that the improved service offered by the CLEC's also provides substantial benefits to AT&T and other IXCs by increasing demand for and utilization of their telecommunications services.

Petitioners operate only in rural areas and on a much smaller scale than the incumbents. They have little or no ability to average higher cost rural service with the lower costs of much larger urban areas. Although the recent changes in price cap carrier access charge rules have deaveraged some components of the incumbents' rates, the usage sensitive rates, which AT&T and others complain of, remain based on study area average.[4] Also, both before and after the CALLS rules, the differences in rate structures between rural CLECs and ILECs often produced inaccurate comparisons.[5]

The Commission's recent decision in *Sprint v. MCG* correctly recognizes that there are legitimate reasons why a CLEC's access rates may be higher than the ILEC with which it competes and that CLEC rates are not *per se* unreasonable just because they are higher than the ILEC's.[6] Except for comparison with ILEC rates, AT&T and the other opponents provide not a scintilla of support for their claims that the rates are unreasonable or supracompetitive. The argument that CLEC rates should be set at "market" levels is merely a reformulation of the

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[4] In the *Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board on Universal Service*, CC Dockets 96-262, 94-1, 99-249, 96-45, rel. May 31, 2000.

[5] For example, per minute carrier common line charges are not comparable where one carrier employs a PICC charge and the other does not. Petitioners generally follow the NECA rate structure used by their rural ILEC affiliates. As discussed at II(F) below, AT&T's argument that it is free to pick and chose where to provide service is equally applicable to the areas served by rural ILECs, whose access rates are also substantially higher than the price cap incumbents.

[6] *Sprint Communications Company, L.P. v. MGC Communications, Inc.*, File No. EB-00-MD-002, rel. June 9, 2000. Sprint Comments at 3-4, suggests that CLECs must take the incumbent prices as a given and should not enter a market where they would charge more. The Commission's decision rejects this version of its *per se* claim.

argument rejected in the *Sprint* decision.[7]

II. AT&T'S DISCONTINUANCE OF SERVICE TO CUSTOMERS OF RURAL CLECS VIOLATES MULTIPLE PROVISIONS OF THE ACT

The Request for Emergency Relief demonstrated the illegality of AT&T's discontinuance of service in order to demonstrate that Petitioners are likely to prevail on the merits and are, therefore, entitled to equitable relief. Time Warner, USTA, NTCA, Montana Telecommunications Association, Haxtun Telephone, and Total Telecommunications, all agreed with this conclusion.[8] AT&T, however, expounded at length about its freedom as a non-dominant carrier to act as it pleases without hindrance by the ugly constraints of the Commission's Rules or the Communications Act.[9] The statute and violations described in the Emergency Request remain applicable to non-dominant IXCs, AT&T's implications to the contrary notwithstanding. Petitioners' response to AT&T's claims of innocence of each of these violations are set forth below, in order of the most blatant to the more sublime.

A. AT&T Explicitly or Constructively Ordered and Utilized the Access Services of Petitioners and Now Seeks to Discontinue or Impair Such Service.

AT&T's repeated argument that Petitioners would have the Commission dictate from which carriers it must purchase access and where it must offer service is apparently designed to

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[7] AT&T's suggestion at 28, n. 17 that Petitioners have elevated their access rates to "subsidize" their local service assumes there is an applicable regulatory answer to the question of proper allocation of joint and common costs, which there is not. In the absence of such a rule, Petitioners have set their access rates at levels essentially equal to that of their affiliated ILECs, with which they have similar cost levels.

[8] Time Warner at 3; USTA at 6; NTCA at 2; MTA at 3; Haxtun Tel. Co. at 2; Total Telecom. at 3.

[9] AT&T at 11.

obscure the essential facts and issues raised by the Emergency Request.[10] Petitioners' request for equitable relief is not about future choices of service providers, it is about discontinuance or impairment of service to existing customers. AT&T either explicitly or constructively ordered access service from each of the named Petitioners, commenced to offer originating and terminating interstate long distance service to Petitioners' end user customers, and obtained a financial benefit by billing and collecting its charges from the end users.[11] Worldcom's argument that there is no discontinuance ignores the unrefuted facts that service was being provided prior to AT&T's unilateral decision to engage in "self-help," although in most cases it has made only partial payments.[12]

AT&T indignantly points to the "audacious" participation of two Petitioners in a lawsuit seeking to recover unpaid access charges. AT&T is apparently incensed because the complaint alleges that AT&T failed to decline service, which AT&T interprets as necessarily implying that an unambiguous cancellation of service is all that would be required. There is nothing inconsistent with Petitioners' participation in a lawsuit to recover their lawful charges and asking this Commission to enjoin AT&T from future violations of the Act. In the *MGC* decision, the Commission rejected AT&T's defense that it had not ordered the service because its purported

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[10] AT&T at 8.

[11] AT&T asserts at p. 24 that it is not discontinuing service where Petitioner listed AT&T on a presubscription ballot without its consent. AT&T specifically agreed or requested to be on the ballots of Petitioners CTC Telecom and Consolidated Communications. Significantly, however, AT&T submitted PIC change requests to Petitioners and in some cases has continued to do so even after instructing Petitioners not to presubscribe customers to AT&T.

[12] Worldcom at 7.

refusal was ambiguous, but explicitly did not resolve the issues raised by Petitioners.[13] *MGC*, therefore, left unresolved the lawfulness of an unambiguous refusal, while pointing out several Sections of the Act to which AT&T's action was subject. There is nothing inconsistent with seeking to recover unpaid charges on the same grounds the Commission ordered AT&T to pay in *MGC*, while seeking to have the Commission address the issues left unresolved in that case.[14]

B. AT&T Failed to Obtain Certification under Section 214(a) for Its Discontinuance of Service; Such Failure Is Not Excused by Reasons Justifying Issuance of a Certificate.

After commencing use of interstate access service, AT&T then refused to pay some or all of the lawfully tariffed charges billed by Petitioners and subsequently directed them not to send it originating, and in some cases, not accept terminating traffic.[15] Despite these actions to discontinue or impair service to a community or part of a community, AT&T has not applied for authority under Section 214(a) for a Certificate of Public Convenience and Necessity, nor complied with the notification requirements of the Section 63.71 of the Commission's Rules.

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[13] *MGC Comm., Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999) (Common Carrier Bureau), aff'd ,15 FCC Rcd 308 (1999)("*MGC*"). AT&T asserts, page 24, n. 13, that RICA is wrong to suggest that the Bureau Order in MGC indicated that Section 214 might be implicated if AT&T "declined to buy MGC's access service" (i.e., discontinued service to MGC's subscribers). The Bureau Order quite plainly supports that interpretation: "AT&T remains subject to a broad variety of statutory and regulatory constraints...which include, without limitation, section 201,202, 203 and 214 of the Act and section 63.71 of the Commission's Rules."

[14] If AT&T is so concerned with consistency, it should compare its own statements to Petitioners that it is legally obligated to recover toll charges from end users, while deriding Petitioners' efforts to collect their lawfully tariffed charges.

[15] AT&T's response to Petitioners' bills has been varied. For some it paid terminating access only, for others it made unspecific partial payments, for another it paid in full after receiving a demand letter, then stopped payment again. For some, it originally sent letters similar to the MGC letter. AT&T has told some Petitioners only that it does not want any originating traffic, while others have also been told not to accept terminating traffic as well.

Thus, neither the affected customers, the public utility commissions and Governors of the states affected, nor the Secretary of Defense have had an opportunity to state any objections to this discontinuance.

AT&T attempts to avoid these requirements by claiming that Section 214 is not concerned with details of how service is provided to a community served by multiple carriers or applicable where service is available from another carrier.[16] The sole support for these claims consists of quotations from earlier Commission proceedings that did not result in a decision excepting carriers from Section 214.[17] In all its recent decisions, practice and Rules, the Commission has unambiguously made clear that the availability of alternative carriers may be a reason to grant a certificate, but does not excuse the application.[18] The Commission even requires such applications in sales situations where the successor company will continue the service without

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[16] AT&T Comments at 21. AT&T attempts to disguise the fact of discontinuance by describing its actions as a decision "not to purchase" access services, but as shown by the uncontroverted facts, AT&T was using such access services, and, in part, paying for them. It then decided to discontinue so doing, thereby imposing a Section 214 requirement.

[17] The statement that Section 214 is not concerned with details in a community served by multiple carriers was from a *Further Notice of Proposed Rulemaking* which discussed the Commission's desire to forebear from exit regulation. *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, Further Notice of Proposed Rulemaking*, 84 FCC 2d 445, 490 (1981).

[18] *Southwestern Bell Telephone Company, et al., Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Services*, 8 FCC Rcd 2589 (1993), *reversed on other grounds*, 19 F3d 1475 (D.C. Cir. 1994) ("SWB Dark Fiber"). ("The BOCs contend that availability of alternative services means there will be no discontinuance of the type contemplated by Section 214...we are not persuaded.") AT&T misstates the holding of this case, which found Section 214 applicable, but denied the applications.

interruption.[19] The Commission has also made clear that where disconnection of service to a carrier results in discontinuance of service to an end user, Section 214 authority is required.[20]

AT&T also claims that Petitioners' customers don't constitute a "community," but the Commission has repeatedly rejected this interpretation of the term.[21] In the *Chastain* case, the Commission explicitly found that users of manual mobile telephones constituted a part of the communications community for which AT&T's discontinuance of service was unlawful in the absence of a Section 214 certificate.[22] More recently, the Commission stated the term community refers to the using public and is not limited to a geographic area: " the BOCs' end user customers, by definition, are encompassed within the term community under Section 214."[23]

Not only do AT&T 's comments ignore these precedents and practice, but most significantly they ignore the Commission's definitive post-1996 decision to streamline, but not

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[19] *Petition and Application of U S West for Declaratory Ruling or Alternatively for Blanket Section 214 Authorization*, 10 FCC Rcd 6077, 79 (1995).

[20] Bell South Telephone Companies, 7 FCC Rcd 6322, 23 (1992). *Public Notice, Comments Invited on GTE Southwest Incorporated's Application to Discontinue Local Exchange and Exchange Access Service for Certain Exchanges in Texas*, NSD File No. W-p-D-456, (March 24, 2000).

[21] AT&T at 21.

[22] *Referral of "Chastain et al. v. AT&T" From the United States District Court for the District of Columbia*, 43 FCC 2d 1079 (1973), *recon. denied*, 49 FCC 2d 749 (1974). The Commission also found AT&T had violated Sections 201(b), 202(a) and 203(c). After settlement of the underlying lawsuit, the Court of Appeals remanded the decision to the Commission on the grounds that it should have provided AT&T an evidentiary hearing on questions of fact going to the reasonableness of the disconnection. The remand order did not implicate the finding that 214 certification was required. *AT&T v. FCC*, 551 F2d 1287 (D.C. Cir. 1977).

[23] SWB Dark Fiber at 2597.

eliminate the requirement for certification prior to discontinuance of service.[24] In so doing the Commission rejected AT&T's request that it should be excused from providing notices to customers: "Even customers with competitive alternatives need fair notice and information to choose a substitute service."[25]

The Commission has routinely considered the arguments of carriers that another carrier's action would adversely affect the first carrier's customers. In none of these cases has the Commission suggested the first carrier lacked standing to raise the issue of the impact on its customers. To the contrary, impact on customers has been found to be "the primary focus" of the inquiry.[26]

C. AT&T's Discontinuance of Service Is not Authorized by Its Own Tariff and Therefore Violates Section 203(c).

AT&T characterizes Petitioners' claims under Section 203 as frivolous and points to the sections in its tariffs which it characterizes as authorizing its conduct. AT&T asserts that its right to disconnect service to end users when AT&T doesn't like the access charges of the end user's LEC is authorized by a provision in its tariffs that states:

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[24] *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, Report and Order*, 14 FCC 2d 11364, 11378-81 (1999). AT&T's recitation of the history of the discontinuation clause in Section 214(a) as a wartime measure dealing with the closing of telegraph offices may be of academic interest, but in the absence of an ambiguity in the statute, regulations or Commission rulings, the legislative history is of no consequence in applying the plain meeting of the statute.

[25] *Id.* at 11380.

[26] *Western Union Tel. Co., Petition for Order to Require the Bell System to Continue to Provide Group and Supergroup Facilities*, 74 FCC 2d 293, 296, 297 (1979) (no impairment of service to customers found). *Lincoln County Tel. System v. Mountain States Tel. & Tel., Memorandum Opinion and Order*, 81 FCC 2d, 328 (1980) (same).

> Service is furnished subject to the availability of the service components required. The Company will determine which of those components shall be used and make modifications to those components at its option. "Service components" shall include, but not be limited to, the existence of access and/or billing arrangements on an originating and/or terminating basis. In the absence of access arrangements between the Company and the access provider at a particular Station, a Customer may be unable to place calls from or to the affected Station.[27]

This claim is without merit. First, the tariff fails to meet the requirements of Section 61.2 of the Commission's Rules:

> In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.[28]

No customer or potential customer of AT&T is likely to understand that the quoted tariff provision means that access arrangements may be unavailable and therefore calls may not be placed to or from any "station" where AT&T has declined for any reason or no reason to utilize the access arrangements which the customer's LEC holds out to as available to all IXCs, which AT&T has utilized in the past, and which other IXCs are presently using. Thus AT&T says its tariff means that if it doesn't like the rates for access offered by a particular LEC then the access doesn't exist.

Whether or not such a tariff provision would pass muster under Sections 201(b) and 202(a), it is the tariff AT&T has written, and for which any ambiguity must be construed

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[27] AT&T at 20, AT&T Tariff F.C.C. No. 27, Sec. 3.1.5.A.2. Note that AT&T's claim of right to discontinue service (which it calls "decline to purchase") "does not depend upon whether [the CLEC's] rates are unlawful." AT&T at 6, n.4.

[28] 47 C.F.R. 61.2(a).

against AT&T.[29] The facts are that the access arrangements exist, and AT&T has been using them. It is not possible that a customer who has been placing and receiving calls could understand that under this tariff provision access arrangements could cease to exist based on the unilateral decision of AT&T, rather than any action of the access service provider. As the Commission has recently stated:

> [C]onsumers must have access to clear information from which to make choices and compare offerings. Indeed, fundamental to the Commission's reliance on market forces ...is the tenet that consumers know... what choice they are given.[30]

AT&T's tariff fails this test.

On the other hand, if AT&T's tariff is taken to mean what it appears to say on its face, then AT&T's discontinuation of service is in violation of the tariff because the access arrangements do exist for both originating and terminating traffic.[31] Petitioners stand by their

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[29] *Halprin, Temple, Goodman & Sugrue v. MCI*, 13 FCC Rcd 22568, 574 (1998) (hereinafter "*Halprin*"): ("It is an unreasonable practice to file a tariff that consumers will not understand."). *Allen Communications v. MCI*, 12 FCC Rcd 6623, 6633; *Associated Press Request for Declaratory Ruling*, 72 FCC 2d 760, 764-65 (1979); *Commodity News v. Western Union Tel. Co.*, 29 FCC 1208, 1213 (1960). ("Tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carriers controls, for the user cannot be charged with knowledge of such intent or with the carrier's cannons of construction.")

[30] *Halprin* at 577.

[31] Worldcom suggests, at 7, that IXCs can not offer service when they can not obtain access arrangements at prices the IXC believes is reasonable. Ignoring, for the moment the IXCs' freedom to connect directly to customers, belief that the price is unreasonable is not the equivalent of can not obtain. Access arrangements are available from the rural CLECs, and at prices which AT&T pays rural ILECs in neighboring exchanges every day. Inconsistency of Petitioner's rates with AT&T's broader agenda, whatever that may be, does not create impossibility. On the other hand, driving the rural CLECs out of business will probably not drive AT&T's stock price back to where was.

original statement: no provision in AT&T's tariff limits its service offering to customers of LEC's whose access rates are approved by AT&T. Section 203(e) provides for a forfeiture of $6000 per offense for each violation of Section 203. The Commission should assess forfeitures on the basis of a separate violation for each call which AT&T has refused to carry.

D. AT&T's Action Constitutes a Refusal to Furnish Service and to Interconnect in Violation of Sections 201(a) and 251(a).

Section 201(a) makes it AT&T's *duty* to furnish interstate and foreign communications service upon reasonable request and empowers the Commission to establish physical connections, through routes and charges and the division thereof.[32] AT&T's discontinuation of originating service to the end user customers of Petitioners, and its discontinuation to all its customers nationwide of service terminating at end user customers of Petitioners, is in violation of that duty.[33] AT&T, in effect, replies that no request for service is reasonable if provision of the service requires it to obtain access at rates it doesn't like. AT&T also claims it has not denied any request for service within the meaning of Section 201(a) because end users can obtain AT&T service by reverting to the ILEC's local service.[34]

Although disclaiming any obligation to obtain access at rates the Commission may ultimately determine to be lawful,[35] AT&T extensively criticizes the level of Petitioners' access rates, calling them "exorbitantly priced," "far in excess of value they provide," "would fail carrier

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32 47 U.S.C. 201(a).

33 *See*, Time-Warner at 4, citing *Hawaiian Tel.*, 78 FCC 2d 1062 (1980).

34 AT&T at 17.

35 See note 26, supra.

specific review for reasonableness," "supracompetitive," "don't reflect economic cost," "excessive," and above "market level."[36] The reasonableness of CLEC rates, and how that should be determined are, of course, issues in the rulemaking which need not be debated here. It is sufficient for the purpose of an order in the nature of equitable relief that the record reveals not a scintilla of support for the claims that Petitioners' rates are unreasonable. Just saying (or in this case repeating over and over) that a request for service is unreasonable does not make it so, especially when coupled with the statement that even if the Commission declares the rates to be lawful the service may still be refused.

Nor is it correct that reasonableness of a request is determined solely by AT&T as it and Worldcom suggest. In granting the Petitioners' request, the Commission should invoke its powers under Section 201(a) to order AT&T to provide its service in and out of Petitioners' exchanges at their tariffed rates until such time as a final determination is made in this proceeding. As Sprint correctly states:

> Allowing carriers to decide whether and on what terms to interconnect can result in inconvenience to the public and can also allow carriers with monopoly or monopsony power to exert undue leverage *vis-a-vis* their smaller counterparts.[37]

AT&T makes the unsubstantiated claim that it has not denied service within the meaning of Section 201(a) because it will serve end users if they change to a LEC with access rates AT&T accepts. There is unquestionably a refusal to serve, the only legal question is whether AT&T has met its burden to establish that the request refused was reasonable. AT&T has not met this

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[36] AT&T at 2, 3, 16, 17, 28.

[37] Sprint at 2.

burden; to the contrary, it is clear that it is unreasonable for AT&T to attempt to dictate customer's choice of local exchange carriers.

AT&T also challenges Petitioners' rights to invoke Section 201(a), and the other pertinent sections in Title II on behalf of end users.[38] AT&T ignores the Commission's long practice of considering the impact on consumers in Title II proceedings brought by carriers. In a complaint by an independent LEC that a Bell Company refused an interconnection which would have allowed the LEC to improve service to its subscribers, the Commission set for hearing the issue of "whether service to subscribers would be more rapid and efficient."[39] Similarly, the Commission emphasized in a Section 214 dispute between carriers that the "concern should be for the ultimate impact on the community."[40] As the Court of Appeals once reminded the Commission, "the concept of standing is a practical and functional one, designed to insure that only those with a genuine and legitimate interest can participate in a proceeding."[41]

E. AT&T's Discontinuance of Service is an Unreasonable Practice in Violation of Section 201(b).

Just as AT&T's action and practice violate Section 201(a)'s requirement to furnish service on reasonable request, these actions also violate the Section 201(b) requirement that "[a]ll charges, practices, classifications and regulations for and in connection with such communication service, shall be just and reasonable...."[42] The effect of AT&T's action is to deny rural customers

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38 AT&T at 10, 28.

39 *Peoples Tel. Coop. v. Southwestern Bell*, 62 FCC 2d 113, 117 (1976).

40 SWB Dark Fiber at 2597.

41 *United Church of Christ v. FCC*, 359 F.2d 994 (1966).

42 47 U.S.C. 201(b).

the opportunity to choose their local exchange carrier, which contravenes a major objective of the 1996 Act. As a result of this lack of choice, the modern, reliable and advanced services which the rural CLECs have made available to them for the first time will become unavailable. AT&T's sole justification is that it has the unilateral right to determine which LECs access charges it will pay and which ones it will not without any obligation to show that any increase in access cost is unjustified, unreasonable or even material.

F. AT&T's Action is unreasonably discriminatory and creates and unreasonable preference in violation of Section 202(a).

It is undisputed that AT&T offers originating service to virtually all LEC customers in the country, except those of certain CLECs, and will terminate traffic of its customers to the customers of virtually all LECs, except certain CLECs. This practice on its face discriminates against the customers of those CLECs and creates a preference in favor of the customers of LECs to whom it does offer service. Once discrimination and preferences by a carrier are established, it becomes the carrier's burden to demonstrate the reasonableness of its actions or practice.[43] AT&T offers two, not entirely consistent, justifications.

First, AT&T contends that it is not discriminating against the end user customers, it is only refusing to purchase access from the CLEC to which they subscribe and the service will be provided if the customers will only switch back to the ILEC. [44] AT&T provides no authority for the proposition that it is not unreasonable to discriminate against customers on the basis of which LEC they have chosen. Certainly from the customer's perspective, this choice is not a matter of

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[43] *American Broadcasting Cos. v. FCC*, 663 F.2d 133 (D.C. Cir. 1980) ("ABC").

[44] AT&T at 18-19.

indifference. For customers to abandon the rural CLEC it means they must also abandon the superior and advanced services which the CLEC provides. By forcing such a choice, AT&T has discriminated against and prejudiced the CLEC customers. AT&T's practice also unreasonably discriminates against, and prejudices the rural CLECs.

Second, AT&T asserts its practice is reasonable because providing service to customers of the rural CLECs would increase its cost of access above what it pays the ILEC. Assuming, *arguendo*, that there is some cost level which would justify discrimination, there is no showing on this record that the rates of the rural CLECs meet that standard.[45] Because their rates are essentially equivalent to that of their affiliated ILECs, AT&T's argument would equally justify refusing to serve the customers of rural ILECs.[46] If AT&T's position is accepted, it will have successfully negated Section 254(g) which requires it to provide uniform toll rates. That is, it will be able to purchase access at an average rate close to that which it negotiated with the BOCs by the simple expedient of not providing service anywhere that access costs are above that level.

III. THE PUBLIC INTEREST STRONGLY FAVORS AN ORDER MAINTAINING THE STATUS QUO

A. AT&T's Practice Will Eliminate the Only Viable Competitor for the Local Access Services of Its CATV Subsidiaries.

With its recent order approving AT&T's acquisition of Media One, the Commission has allowed AT&T to become the largest cable operator in the country, in addition to being the IXC

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[45] *MCI v. FCC*, 917 F.2d 30, 39 (1990) and ABC, cited by AT&T deal with whether a carrier's *differing prices for like services involve unreasonable discrimination, not with whether* a carrier may discontinue service to otherwise similarly situated customers because the cost of access to some are higher.

[46] NTCA at 5.

with the largest market share. AT&T's announced plan for the use of its newly acquired cable empire is to provide competition for telephone companies in the local exchange and exchange access business.[47] As stated by U S West:

> AT&T's market power in the telecommunications marketplace, dramatically augmented by its monopoly power in the cable telephone and cable Internet markets, overshadows the power of even an ILEC. If AT&T could simply decide that it would provide long distance service only to the local exchange carriers...and/or cable companies with whom it chooses to deal, it could effectively eliminate much of the competition in all markets in which it participates.[48]

AT&T therefore has a substantial corporate interest in leveraging its position in the long distance business to eliminate or cripple its potential competitors in the local exchange business.[49] It is precisely because the rural CLEC's have deployed broadband capability where the ILEC's have not, that they are more of a potential roadblock to AT&T's goal of using the broadband capabilities of cable networks to provide faster services or lower costs than the incumbents.

The Commission must, therefore, judge the reasonableness of AT&T's actions in light of its motive and ability to eliminate rural CLECs as potential competitors.

B. Harm to Petitioners is Irreparable.

The most seriously damaged Petitioners are those which AT&T has directed not to accept terminating traffic. Given AT&T's 40% market share, it should be obvious no local exchange

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[47] Cecilia King, "AT&T expands local phone-over-cable service" San Jose Mercury, June 27, 2000, www.mercurycenter.com/svtech. "Local phone service is a crucial piece of AT&T's long-term strategy to bundle all of its services–local and long distance calling, Internet connection, cable television and wireless–into one package...AT&T...said it plans to sign 400,000 local phone service subscribers nationwide by the end of the year." *See*, Attachment A.

[48] AT&T News Release, Feb. 4, 2000.

[49] U S West at 5; Sprint at 2-3; MTA at 4.

carrier can stay in business if 40% of the population cannot call its subscribers via their presubscribed carrier. Nobody will subscribe to such service.

AT&T points to disconnection of its service to Heart of Iowa as evidence that loss of AT&T service is not irreparable harm, because the carrier remains in business after AT&T service has become unavailable.[50] The fact that Heart of Iowa has not collapsed does not prove that it has not been injured irreparably, such injury need not be immediately fatal or even ultimately fatal. Some customers have left Heart of Iowa because of inability to obtain AT&T services. This CLEC, like the other Petitioners to which AT&T continues to send (and sometimes pay for) terminating traffic, is nevertheless disadvantaged in the competitive marketplace because it can not offer subscribers the same access to interexchange carriers as the incumbent. In some markets, business customers are local operations of national companies or franchises which have national contracts with AT&T and thus no ability to select another IXC. These facts flow necessarily from AT&T's practice and can be recognized without affidavits stating the obvious.[51]

C. Harm to AT&T is unlikely and in any event, negligible.

When a customer leaves a price cap ILEC and subscribes to the service of a rural CLEC charging NECA level rates, the impact on AT&T is the same as if the exchange had been sold to a rural ILEC and brought back into the NECA pools. The Common Carrier Bureau recently approved such a transfer of 105 exchanges and over 214,000 access lines purchased from GTE

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[50] AT&T at 26.

[51] See Total Telecommunications at 7.

over AT&T's opposition.[52] The Bureau noted the purchaser's calculation that the effect on AT&T's long distance service would be approximately $.00000227 per minute and rejected AT&T's complaints of increased access charges, finding the effect negligible.[53]

The individual Petitioners, as well as those in the Minnesota CLEC Consortium serve substantially fewer access lines than are involved in the Bureau. Recognizing that incumbent rates are different in different states, an order of magnitude interpolation suggests that if AT&T were required to pay rural CLECs for 50,000 lines at NECA level access rates, it would need to increase its per minute long distance rates by less than 60 millionths of a cent ($.00000060)[54]. Assuming, *arguendo*, that paying an increased rate is "harm" whether or not that rate is fully cost justified, reasonable and lawful, AT&T can not show that paying Petitioners tariffed rates it will cause it to suffer in any material way while awaiting a final decision from the Commission.

U S West alleges that grant of the Emergency Petition would somehow entitle AT&T to recover from the Treasury the excess of access charges paid over a reasonable rate.[55] No such right exists, however, at least in the absence of an order with confiscatory effect, and not even AT&T has argued that it would be so unable to recover the costs of Petitioners' access charges

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[52] *CenturyTel of Northwest Arkansas, LLC, et al., Joint Petition for Waiver of Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules, Memorandum Opinion and Order*, DA00-1434 (June 27, 2000) ("CenturyTel").

[53] *Id.* at 13.

[54] Assuming Petitioners serve approximately one quarter of the number of lines acquired by Century, .25 X .00000227 = .00000057. If 100,000 lines were billed at NECA level rates the increase in AT&T per minute charges required would be $.00000114. This calculation assumes no measurable de-stimulation.

[55] *U S West* at 4.

that the financial stability of the enterprise would be threatened.[56] In any event the question is entirely academic: Petitioners do not claim a right to charge rates above a reasonable level. Petitioners deny their rates are unreasonable and there is no evidence whatever to the contrary.

Section 254(g) contemplates that some access costs will be higher and some lower, but that as a matter of national policy, long distance rates will be uniform nation wide. It is understandable that AT&T does not like this provision of the law, but it must take its complaint to Congress, rather than find backdoor means to subvert the law.

D. Failure to Act Promptly will Encourage "self-help" actions which the Commission has consistently deplored.

Although the Commission in *MGC* found AT&T's refusal to pay for switched access services it had used was "impermissible self-help," that finding has apparently not registered anywhere in AT&T's corporate consciousness, since it continues the practice to this day.[57] In some instances the circumstances are almost identical, in others the ambiguity is less apparent, but the fact of discontinuing service rather than challenging the reasonableness of the access charges demonstrates an clear intent to continue self-help solutions at the expense of the public.

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[56] Given the games AT&T played with the Commission following the CALLS order which reduced its access costs approximately $1.3 Billion (assuming a 40% share of the $3.2 Billion total), it is inconceivable that AT&T could argue it would be harmed by recovering any increase in access costs as a result of end users converting to the superior service of the rural CLECs.

[57] *MGC*, 14 FCC Rcd at 11659.

IV. CONCLUSION

The Petitioners have shown: that AT&T has discontinued service to communities or parts of communities without the certification required by Section 214; that such action is without any support in its tariffs, in violation of Section 203(c); that AT&T's actions violate Section 201(a)'s requirements that it furnish service on reasonable demand and that it interconnect with other carriers; its actions create unjust and unreasonable discrimination and undue and unreasonable preferences in violation of Section 202(a); and that AT&T has refused interconnection in violation of Section 251(a). As the largest IXC in the country, with $40 Billion in revenue, AT&T's defense is that as a "nondominant" carrier it is free to pick and choose from which LECs it will purchase access. By this obfuscation, AT&T means it believes it is free to reject customers because they have taken advantage of the opportunity to choose a LEC which offers vastly superior service and makes broadband Internet access available for the first time. AT&T presents no evidence whatsoever that the access rates of these CLEC's are unreasonable.

AT&T asked the Commission to initiate the current rulemaking inquiry into IXC's rights to pick and choose where they will serve, but without waiting for an answer, it initiated "self help" which will have the effect of resolving the issue in its favor before the Commission can act. Petitioners are not, as AT&T and others suggest, seeking an order requiring any carrier to extend service beyond where it has held out. Petitioners seek only to maintain the status quo by an order

prohibiting AT&T from discontinuing service. Such an order is urgently needed to ensure the survival of competition in the rural areas served by Petitioners.

Respectfully submitted,

Rural Independent Competitive Alliance

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June 29, 2000

Attachment A

News Release

FOR RELEASE FRIDAY, FEBRUARY 4, 2000

AT&T – MediaOne Combination Will Speed Local Phone Competition and Bring High Speed Internet Services to More Consumers, AT&T's Cicconi Says

WASHINGTON - MediaOne and AT&T together will bring video, voice, and data services to more communities, more quickly and more cost-effectively than either could do on its own, AT&T General Counsel Jim Cicconi said today.

At a public forum conducted by the FCC's Cable Services Bureau, Cicconi said AT&T's strong brand and customer care experience will allow the combined company to more effectively challenge the incumbent local phone monopolies than a cable company like MediaOne could do on its own. He added that the combined resources, skills, and footprint of AT&T and MediaOne will provide the size and scope necessary to truly compete with the incumbents.

"AT&T's launch of cable telephony services is well underway," Cicconi stated. "In 1999, market trials of telephony services were launched in the Bay Area, Chicago, Pittsburgh, Dallas, Denver, Seattle, Salt Lake City and Portland. Today, AT&T is marketing and selling its telephony services in 13 cities in California, Illinois, Texas and Colorado."

Consumers are already benefiting from AT&T's competitive local phone service offerings, Cicconi noted. In Fremont, California, for example, AT&T offers second and third phone lines for only $5.00 per month - a significant discount off of PacBell's second line rate of $10.69 per month.

In addition, AT&T's rollout of high-speed cable modem Internet services has led the local monopolies to speed up the introduction, and lower the price, of high-speed DSL services in response.

Cicconi also reiterated AT&T's commitment to provide its high-speed Internet customers with a choice of ISPs, as soon as certain contractual obligations have expired, and direct access to all the content available on the World Wide Web.

"I am proud of AT&T's leadership and commitment to building a competitive marketplace," Cicconi concluded. "Simply put, the combination of AT&T and MediaOne will bring consumers more choices and lower prices. We've seen it in long distance and we've seen it in wireless, and we are now seeing it in Fremont and Dallas and other areas where AT&T has launched its cable telephony services. When companies compete, consumers win."

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News Release

FOR RELEASE TUESDAY, JANUARY 11, 2000

AT&T Reaffirms 1999/2000 Financial Guidance, Reports Fast Start in Local Phone Service

NEW YORK – AT&T Chairman C. Michael Armstrong reaffirmed the company's confidence in meeting its 1999 and 2000 financial targets, speaking at a conference of financial analysts today.

Armstrong also said that AT&T is off to a fast start in the residential local phone service market. Since its introduction late last year, more than 100,000 New Yorkers have signed up for AT&T Local One Rate New York – 40,000 in December alone. In New York, AT&T is providing residential telephony service over facilities leased from the local Bell company.

AT&T is also ahead of target in upgrading its cable facilities for two-way communications. It now offers local phone service over its broadband cable facilities in 16 cities, and is adding customers at three times the rate as in November, Armstrong said.

"Our marketplace experience as well as yesterday's announcement of a merger between AOL and Time Warner reconfirmed the soundness of our broadband strategy and our broadband investment," Armstrong said.

"Our strategy for growth is on track as we transform AT&T from a domestic long distance company to an any-distance, any-service global company," he said. "No one should doubt our resolve to deliver customers a choice for local telephone service and more.

"Local residential sales continue at a brisk pace as customers continue to embrace the bundled offer," Armstrong said. "Our only serious disappointment, and most significant risk in the New York market, remains Bell Atlantic's poor provisioning performance.

"In our view, Bell Atlantic continues to fall short of what the law requires and customers deserve. It still isn't as easy or economical for AT&T or other local competitors to switch local customers as it is for Bell Atlantic to switch long distance customers. Today, it takes us 7 to 10 days to provide service to a customer when it should take 2 to 3 days. That's why it's so important for the Federal Communications Commission to make good on its promise to remain vigilant, and for Bell Atlantic to continue to improve its systems and provisioning.

"Consumers are making it abundantly clear that they want a choice of local phone service providers," Armstrong said. "The entire AT&T company is focused and committed to providing that choice whether by broadband cable television technology, fixed wireless, the use of the incumbent carrier's facilities, or other alternatives."

Armstrong said that AT&T is also at or ahead of target with services such as AT&T One Rate(sm) Seven Cents long distance service, and business local and frame relay service. AT&T has nearly 5 million

customers on the AT&T One Rate Seven Cents plan, he said, 35 to 40 percent of whom are new to AT&T.

When reporting fourth quarter financial results on January 25, Armstrong said AT&T expects to announce that total pro forma revenue grew between 5 to 7 percent in 1999. Earnings per share (EPS) for 1999 are expected to be between $2.15 to $2.20. Earnings before interest, taxes, depreciation and amortization (EBITDA) for 1999 is expected to be at the high end of the previously announced range of $18 to $20 billion.

For 2000, Armstrong reaffirmed that total pro forma revenue growth will range between 8 to 9 percent, a 30 to 60 percent increase from the revenue growth rate expected for 1999, excluding the impact of Concert, the global joint venture with BT. Earnings per share for 2000 are projected to range between $2.10 to $2.15 (which also excludes the impact of Concert). Cash EPS (which adds back the impact of purchased intangibles) in 2000 is expected to range between $2.50 to $2.60. Operational EBITDA is projected to range between $24 billion to $26 billion in 2000.

"We've met or exceeded our revenue growth commitments for seven consecutive quarters," Armstrong said. "We intend to build on that track record as we execute our any-distance strategy."

Armstrong also outlined growth prospects for 2000 for the "core" AT&T, in light of the company's plans to create a wireless tracking stock. Even without wireless, he said, the rest of AT&T will grow revenue 5 to 6 percent, and EBITDA is expected to range between $22 billion to $24 billion.

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For information about AT&T services (including current prices), visit:

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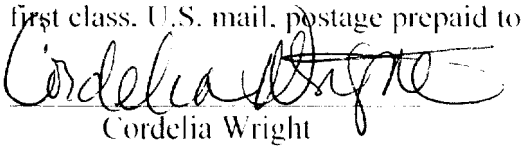
CERTIFICATE OF SERVICE

I, Cordelia Wright, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, C 20037, do hereby certify that a copy of the foregoing "Reply Comment" of the Rural Independent ompetitive Alliance was served on this 29th day of June 2000, by first class, U.S. mail, postage prepaid to e following parties:



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